90-824

No.

in the Supreme Court of the United States

October Term, 1990

JUAN DELGADO, DAGOBERTO SILVA and HENRY ESCOBAR,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I.

THE DECISION OF THE COURT BELOW, SPECIFICALLY THAT THE PROSECUTOR'S REMARKS DURING REBUTTAL SUMMATION DID NOT PREJUDICE THE PETITIONERS, AND THAT THE TRIAL COURT DID NOT ERR BY FAILING TO GRANT A MISTRIAL BECAUSE OF THE PREJUDICE, IS IN DIRECT CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS, REFLECTING A PARTICULAR NEED FOR A UNIFORM STANDARD AND APPLICATION OF LAW.

II.

THE DECISION OF THE COURT BELOW, WHICH DETERMINED THAT THE PLEA AGREEMENT ENTERED INTO BY A CO-DEFENDANT AND THE COLLOQUY BETWEEN THE CO-DEFENDANT AND THE GOVERMENT WAS INADMISSIBLE, IS IN DIRECT CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS, REFLECTING A PARTICULAR NEED FOR A UNIFORM STANDARD AND APPLICATION OF LAW.

III.

THE DECISION OF THE COURT BELOW, WHICH DETERMINED THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ALLOW THE PETITIONERS TO CROSS EXAMINE A GOVERNMENT WITNESS REGARDING STATMENTS MADE BY A CO-DEFENDANT IMMEDIATELY AFTER HIS ARREST, IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT, REFLECTING A PARTICULAR NEED FOR A UNIFORM STANDARD AND APPLICATION OF LAW.

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The Petitioners, JUAN DELGADO, DAGOBERTO SILVA, and HENRY ESCOBAR, by their undersigned counsel, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the proceedings on June 25, 1990.

OPINION OF THE COURT BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at *United States v. Delgado*, 903 F.2d 1495 (11th Cir. 1990).

JURISDICTION

The judgment of the Court of Appeals affirming the judgment of the United States District Court was entered on June 25, 1990. A timely joint petition for rehearing and clarification was filed on July 12, 1990, and was denied on August 20, 1990. This petition is filed pursuant to Rule 20, Rules of the Supreme Court, as amended. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code, Section 1251(1).

STATEMENT OF THE CASE

On March 16, 1987, U.S. Customs Service inspectors examined what appeared to be an ordinary shipping container that had arrived at the Dodge Island Seaport, in Miami, Florida from Guayaquil, Ecuador [2SR.3:D259:45-6, 104-5].

The container was consigned to Ajami Import/Export Company. All Customs documents, invoices, and the bill of lading indicated that the items inside the shipping container, including the container itself, were ordered by and were being sent to Ajami Import/Export Company, located at 7860 N.W. 58th Street, in Miami, Florida [2SR.3:D259:47, 62-8].

During an examination of the container, a false wall was discovered. Customs inspectors drilled through the side wall and discovered cocaine [2SR.3:D259:47-50, 105-7]. The inspector then contacted the Florida Joint Task Force and the DEA, and a decision was made to attempt delivery of the container [2SR.3:D259:50].

A driver named Elvis Wong from IWDC Delivery Company had been sent to pick up the container. The container was released to him after the inspection [2SR.3:D259:78, 108]. DEA Special Agent Mark Averi was assigned to ride undercover in the truck with Mr. Wong [2SR.3:D108; 2SR.3:D260:29-31]. They first drove to the address on the bill

of lading, 8527 N.W. 56th Street. The driver was then informed by the dispatcher that the drop-off site was changed to 7860 N.W. 58th Street [2SR.3:D260:53-5].

The container was first brought to the Ajami Import/Export office. The driver was met by Ajami and Henry Escobar. The driver was instructed by Ajami to take the container to a different location and directed him to follow him (Ajami) and Ricardo Duran to that location [2SR.3:D260:35-6]. They followed Ajami and Duran to the warehouse located at 8727 N.W. 56th Street. Ajami opened the bay door to the warehouse, signed the bill of lading accepting receipt of the container, and directed Wong to back the truck into the warehouse (2SR.3:D260:36, 61]. Special Agent Averi then left with Wong. At approximately 7:30 p.m., Averi returned to the warehouse, where surveillance was established [2SR.3:D260:39-40].

Surveillance continued through the next day [2SR.3:D259:51, 109, 116]. DEA Special Agents Sinclair and Engelman noticed a Toyota, which had appeared at the warehouse earlier, return to the warehouse with two occupants. Shortly thereafter, a van carrying three people arrived [2SR.3:D259:52-3, 109]. Sinclair said he saw two of the three men who arrived in the van go to the Toyota and take out what appeared to be tools, and carry them into the warehouse. One of the two people carrying the tools appeared to be Ajami [2SR.3:D259:63, 77]. Thereafter, four of the five people who had arrived came out of the warehouse carrying cardboard boxes, and loaded them into the van [2SR.3:D259:57, 100, 11; 2SR.3:D260:46, 75]. Agents Sinclair and Averi testified that there was nothing unusual about this loading activity occurring outside the warehouse, and no efforts made to hide the activity [2SR.3:D259:102-3; 2SR.3:D260:76].

Soon thereafter, approximately eight to ten agents converged, arresting Ajami, Duran, Silva and Delgado outside of the warehouse. Averi found Escobar inside the warehouse [2SR3:D260:41-2]. A search of the warehouse uncovered several tools, including a chisel, a flashlight, and cutting

blades [2SR3:D260:41-2]. In the van, agents found 22 boxes, and found one box in the trunk of the Toyota [2SR.3:D260:176-82].

During the trial, the court ordered the government to disclose to defense a copy of the plea agreement entered into between the prosecutor and Ajami, who had been an indicted co-defendant. The court also ordered produced the transcript of Ajami's plea colloquy [2SR.3:D263:154; 2SR.3:D264:2-3]. This was the first time the terms and conditions of Ajami's plea bargain, and the government's position regarding the bargain, was made available to the defense. It was only at that time that the defense learned that the government had agreed to dismiss the indictment against Ajami in this case. In return, Ajami was to plead guilty to violating Title 18, United States Code, Section 542, charging him with "knowingly and intentionally attempting to enter or introduce into the commerce of the United States imported merchandise by means of a false or fraudulent invoice..." The details of the government's admissions regarding Ajami's participation in that case were set forth in the plea colloquy transcript. Counsel for Escobar asked the court to admit into evidence a copy of the plea agreement along with a transcript of Ajami's plea colloquy [2SR.3:D264:4-9, 11-3]. The government objected to its introduction, and the court sustained the objection [2SR.3:D264:13].

In the colloquy, the government proffered that in the beginning of 1987, and continuing through March 17, 1987, Ajami attempted to bring into the United States merchandise for which he did not have invoices. Counsel for Petitioners argued that the statement by the prosecutor was a representation by the government, and should have been admitted as an admission by a party opponent pursuant to Rules 801(d)(2)(C) and 801(d)(2)(D) [2SR.3:D264:13].

During rebuttal summation, the prosecutor argued to the jury that another person, obviously referring to Ajami, had plead guilty to the charges in this case, and asked the jury to "focus their attention" on this other person. Defense

counsel objected to the prosecutor's improper argument. The court instructed the jury to disregard the statements of *both* counsel:

> MR TAMEN [PROSECUTOR]: Ignore the reasonable and sensible conclusions that when you have got just single packages like this that are worth more money than a lot of honest working people make in a year's time on an honest job — ignore that; focus your attention either on people who have either plead guilty in this case or are not shown to have had an active role at all.
>
> MR. BLACK [DEFENSE COUNSEL]: If Your Honor please, they dismissed the indictment. I object to that.
>
> THE COURT: There is no evidence about that, what you just said, nor is there any evidence of that.
>
> MR. BLACK: I ask the jury to be instructed that that is not true, Your Honor.
>
> THE COURT: Well, I am going to instruct the jury to disregard the statements of both counsel in that regard.

[2SR.3:D265:121-2]. Thereafter, prior to the court giving the jury their instructions, defense counsel asked for a sidebar, and moved for a mistrial:

> MR. BLACK: If Your Honor please, before the instructions, could I approach the bench regarding two legal matters?
>
> THE COURT: Yes.
>
> MR. BLACK: Thank you, Your Honor.
> (Sidebar conference).
>
> MR. BLACK: If Your Honor please, I am going to move for a mistrial based on Mr. Tamen's statement that somebody in this case has plead guilty. He argued to the jury — first of all, there is no evidence

of that.

Secondly, it is an improper argument telling the jury that somebody else is admitting their guilt and, third, it is factually incorrect. Mr. Ajami did not plead guilty to this indictment.

He plead guilty to some information that's totally unrelated to the charges in this case. So for separate reasons that's wrong. I think that we are entitled to a mistrial because of that. I know the court instructed the jury to disregard, and rightfully so, but I think that it is not something the jury is going to disregard.

That there was an attempt to overcome our arguments regarding Mr. Ajami and his participation in the case and his claiming that, now obviously referring to Ajami, that he plead guilty to these charges, and while not only being untrue, adds credence to his case. I think that has improperly and prejudicially affected the defendants who are on trial and particularly my client, Henry Escobar, I think the only relief in that is a mistrial.

MR. ROSENBERG [DEFENSE COUNSEL]: I join in that request.

MR. WEISBERG [DEFENSE COUNSEL]: I join in that request.

★ ★ ★

THE COURT: Well, in any event, what is done is done. I have instructed the jury to disregard both statements and I will deny the motion. You made your record.

[2SR.3:D265:122-4].

There was no evidence adduced at trial that Ajami had plead guilty. The defense had tried to introduce that evidence by introducing a transcript of his guilty plea. However, the government objected to the introduction of this transcript,

as well as Ajami's plea bargain, and the court sustained the objection [2SR.3:D264:11-3]. After the government's rebuttal summation, defense counsel moved again to admit into evidence the plea bargain and the transcript of the guilty plea. Once again, the government objected, and the court sustained the objection [2SR.3:D264:124-6].

During the trial, counsel for Escobar attempted to cross examine Case Agent Culver on a post-arrest statement made by Ajami. The defense submitted to the court a copy of Culver's DEA-6 which set forth, in paragraph 8, the substance of the statement made by Ajami to Culver [2SR.3:D.261:44-50]. This report stated as follows:

> Ajami, when questioned by Special Agent Culver, stated that he was in the warehouse unloading merchandise. Ajami stated that he was an importer of furniture. Ajami said that four persons just showed up at the warehouse and Ajami did not know why. Ajami stated that he thought he might know who the other four persons were, that he had seen them before. Ajami further stated that he did not know where the van came from or who was driving. When questioned by Special Agent Culver about the container, Ajami stated that he did not want to answer any more questions.

Counsel for Escobar sought to introduce this into evidence as a statement that exculpated Escobar and the other defendants. It was also a statement against Ajami's penal interest, pursuant to Federal Rule of Evidence 804(b)(3) [2SR.3:D.261:51]. The defense tried to elicit this statement from Culver both on cross examination [2SR.3:D.261-44-51], and on redirect examination, when he was called as a defense witness [2SR.3:D.264:37, 73-5]. Both times the government objected, and the court sustained the objections [2SR.3:D.261:51; 2SR.3:D.264:74-5].

Escobar, along with Silva, Delgado, Duran and Ajami, was charged in a four-count indictment with conspiracy to distribute cocaine, possession with the intent to distribute

cocaine and with importation of cocaine [2SR.1:D1]. The jury found Escobar guilty on two counts; conspiracy to distribute cocaine and possession with the intent to distribute cocaine [2SR.2:D210; 2SR.3:D284]. Escobar was sentenced to a term of twenty years' imprisonment on both counts to run concurrently, with a term of five years' supervised release on the possession with the intent to distribute count [2SR.3:D282]. During the trial, the government dismissed the importation charge against Silva and Delgado. Both were convicted of the conspiracy and possession counts. Silva and Delgado were sentenced to 11 years' imprisonment on the conspiracy count, and 11 years' imprisonment with 5 years' supervised release on the possession count, to run concurrent to the sentence on the conspiracy count.

REASONS FOR GRANTING THE PETITION

I.

THE DECISION OF THE COURT BELOW, SPECIFICALLY THAT THE PROSECUTOR'S REMARKS DURING REBUTTAL SUMMATION DID NOT PREJUDICE THE PETITIONER, AND THAT THE TRIAL COURT DID NOT ERR BY FAILING TO GRANT A MISTRIAL BECAUSE OF THE PREJUDICE, IS IN DIRECT CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS, REFLECTING A PARTICULAR NEED FOR A UNIFORM STANDARD AND APPLICATION OF LAW.

In cases involving allegations of prosecutorial misconduct of this type, the trial court's refusal to grant a mistrial is reversible only for an abuse of its discretion. *United States v. Johnson*, 713 F.2d 654, 659 (11th Cir. 1983), *cert. denied*, 465 U.S. 1030 (1984). There have been instances, however, where prosecutorial misconduct has so seriously prejudiced a defendant that convictions have been reversed on appeal. *See United States v. Pierson*, 674 F.2d 396, 399 (5th Cir. 1983), *citing United States v. Dintz*, 424 U.S. 600, 608 (1975); *Baker v. Meckcalf*, 633 F.2d 1198 (5th Cir.), *cert. denied*, 451 U.S.

974 (1981). Specifically, misconduct by a prosecuting attorney in closing argument has served as a basis for reversal of a conviction. *Berger v. United States*, 295 U.S. 78 (1934). Prosecutors must refrain from using arguments which do not have any basis in the record as they go far beyond the legal metes and bounds, which is defined by the evidence before the jury. *United States v. Cole*, 755 F.2d 748 (11th Cir. 1985), *citing United States v. Phillips*, 664 F.2d 971 at 1030 (5th Cir. Unit B 1981), *cert. denied*, 457 U.S. 1136; *United States v. Vera*, 701 F.2d 1349, 1361 (11th Cir. 1983).

In the present case, the prosecutor clearly went beyond the legal metes and bounds as defined by the evidence before the jury in making his rebuttal summation. The prosecutor specifically argued in summation evidence which was not in the record (due to *their* own earlier objection), and the statement made by the prosecutor was *actually false*.

It was also improper for the prosecutor to argue that Ajami had plead guilty to the same charges, since the jury could reasonably infer from this argument that the Petitioners were also guilty. *See, e.g., United States v. Smith*, 806 F.2d 971 (10th Cir. 1986); *United States v. Austin*, 786 F.2d 986 (10th Cir. 1986); *United States v. Griffin*, 778 F.2d 707, 710 (11th Cir. 1985); *United States v. Baez*, 703 F.2d 453 (10th Cir. 1983). The rule in this regard was clearly set forth in *Baez, supra:*

> A co-defendant's guilty plea may not be used as substantive evidence of a defendant's guilt...if the co-defendant testifies, however, either the government or the defense may elicit evidence of a guilty plea for the jury to consider in assessing the co-defendant's credibility as a witness...Because of the potential for prejudice, cautionary instructions limiting the jury's use of the guilty plea to permissible purposes are crucial.

703 F.2d at 455 (citations omitted).

The Eleventh Circuit's decision is in direct conflict with the decision in *Payton v. United States*, 222 F.2d 794 (D.C. Cir.

1955). In *Payton*, a co-defendant's guilty plea was received in the presence of jurors who tried Payton. During the trial, and again when instructing the jury, the court called attention to the co-defendant's guilty plea. The Court of Appeals held that, since the evidence showed a close association between the defendant and his co-defendant in the events leading to the arrest, "the effect of impressing the jury so forcibly with her plea of guilty prejudiced the appellant's right to be tried solely on the evidence against him rather than on admission of another's guilt." *Id.* at 796. *See also, United States v. Impson*, 531 F.2d 274, *reh'g denied*, 535 F.2d 286 (5th Cir. 1976) (cautionary instruction could not cure harm of testimony during presentation of prosecutor's case-in-chief concerning defendant's failure, at time of arrest, to explain presence of contraband in car in which he was riding).

Here, although the Eleventh Circuit agreed that the prosecutor's argument was incorrect, the court found that it was not prejudicial because the false statement actually *supported* the Petitioners' argument, which the court characterized as that Ajami was to be blamed for the crimes that occurred. The court simply misinterpreted the Petitioners' argument below. The Petitioners' theory of defense and argument at trial was that Ajami *alone* was guilty of the crimes charged in the Indictment, and that the Petitioners were innocent of the crimes charged in *this* case. The false statement by the prosecutor was designed to influence the jury to find the Petitioners guilty because of their association with Ajami, and because they were charged together in *this* case with someone who had plead guilty to the charges in *this* case. The Eleventh Circuit substituted its judgment for that of the jury, yet ignored certain facts established at trial in order to avoid a reversal in this case. The prejudice was apparent, thus this case conflicts with the Circuit Court decision in *Payton v. United States*, 222 F.2d 794 (D.C. Cir. 1955) and *United States v. Impson*, 531 F.2d 274 (5th Cir. 1976).

II.

THE DECISION OF THE COURT BELOW, WHICH DETERMINED THAT THE PLEA AGREEMENT ENTERED INTO BY A CO-DEFENDANT AND THE COLLOQUY BETWEEN THE CO-DEFENDANT AND THE GOVERNMENT WAS INADMISSIBLE, IS IN DIRECT CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS, REFLECTING A PARTICULAR NEED FOR A UNIFORM STANDARD AND APPLICATION OF LAW.

During the trial, Petitioners sought to introduce into evidence the transcript of Ajami's plea colloquy and Ajami's plea agreement, since these documents constituted hearsay evidence admissible under Federal Rule of Evidence 801(d)(2)(D), as admissions by a party opponent.

The Ajami plea agreement and the transcript of the plea colloquy were admissible. The Indictment in this case charged the Petitioners, together with Ajami, with conspiracy to distribute cocaine — the cocaine that was seized at Ajami's warehouse. Prior to the trial, the government entered into plea negotiations with Ajami. During the plea colloquy, the government made factual admissions that Ajami was not involved in the drug conspiracy charged in the Indictment. These admissions by the government were a partial defense for the Petitioners to the charges in Count 1 of the Indictment, thus making the plea agreement and colloquy relevant and admissible.

The opinion of the Eleventh Circuit completely ignores the issue of relevance, and further failed to recognize the prejudice suffered by the Petitioners by being denied the opportunity to introduce Ajami's plea agreement and the transcript of the colloquy into evidence. In fact, the court completely ignored the issue of whether the government's statements were admissions by a party opponent, but rather, adressed the problems that *might* arise during plea negotiations if every statement the government made was construed as an ad-

mission. Here, however, the admissions went much further, since they bore directly on the issue of the Petitioners' guilt.

The opinion of the Eleventh Circuit directly conflicts with an earlier Eleventh Circuit decision, and decisions of the Second Circuit Court of Appeals. In *United States v. Gossett*, 877 F.2d 901 (11th Cir. 1989), the court implicitly held that the government is a party opponent of the defendants in a criminal case. *Id.* at 906. Although the court determined that the testimony of a co-defendant was not admissible as an admission by a party opponent under Rule 801(d)(2)(D), the court found that the government would be the party opponent of the defendants. Therefore, if the admissions had been made by the government, they would have been admissible under Rule 801(d)(2)(D) as admissions by a party opponent. This was the exact situation presented by the Petitioners below.

In *United States v. Blood*, 806 F.2d 1218 (4th Cir. 1986), the court held that, since references made by the government during voir dire questions that contrasted with what the government stated in its opening statement were inadvertent, they would not constitute admissions. *Id.* at 1221. However, the court did find that if admissions of fact are made by a party's attorney, including the government attorney, these admissions would be binding upon a party as admissions by a party opponent pursuant to 801(d)(2)(D).

In the present case, the prosecutor's statements were not inadvertent or ambiguous, and were clearly admissions advanced by the government in an effort to have the court accept Ajami's guilty plea.

In *United States v. Green*, 497 F.2d 1068 (7th Cir. 1974), the defendant argued that the government had made an admission at the defendant's pretrial bond hearing that he was insane, and the trial court erred in not admitting the government's prior statement as an admission of a party opponent. The court held that the government's statement could not be deemed an admission that the defendant was legally insane at the time of the crime, since the government did not adopt the statement, but rather, merely quoted from a psychiatric

report. *Id.* at 1084. Inferentially, again, if the government's statement had been an admission and a statement of fact, and not simply a verbatim recital of another's findings, the court would have admitted the government's prior statement as an admission of a party. *Id. See also, United States v. McKeon*, 738 F.2d 26 (2d Cir. 1984); *United States v. Margiotta*, 662 F.2d 131 (2d Cir. 1981).

Thus, the court below chose to advance a policy argument rather than properly apply the Federal Rules of Evidence to allow into evidence these admissions by the government as admissions by a party opponent.

III.

THE DECISION OF THE COURT BELOW, WHICH DETERMINED THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ALLOW THE PETITIONERS TO CROSS EXAMINE A GOVERNMENT WITNESS REGARDING STATEMENTS MADE BY A CO-DEFENDANT IMMEDIATELY AFTER HIS ARREST, IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT, REFLECTING A PARTICULAR NEED FOR A UNIFORM STANDARD AND APPLICATION OF LAW.

The Eleventh Circuit agreed that it was correct for the trial judge to limit defense counsel's cross examination of Special Agent Culver regarding a post-arrest statement made by Ajami to him, and further in disallowing the Petitioners the opportunity to introduce this statement after the Petitioners called Culver as their witness. Unfortunately, the court below has misapprehended matters of law in this regard. The statement made by Ajami was evidence which was exculpatory to the Petitioners, and pursuant to the standards set forth in *Chambers v. Mississippi*, 410 U.S. 284 (1973), the Petitioners had the right to present this exculpatory evidence and have the jury hear it.

In *Chambers v. Mississippi*, this Honorable Court sets forth the elements necessary in order for a defendant to receive a fair trial:

> The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine the witness and to call witnesses in one's own behalf have long been recognized as essential to due process. Justice Black, in writing for the Court in *In re Oliver*, 333 U.S. 257 (1948), identified these rights as among the minimum essentials of a fair trial:
>
> > "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense — a right to his day in court — are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and be represented by counsel."

Id. at 295 (citations omitted).

This Court then states that, although generally, out-of-court statements are traditionally excluded because they lack the conventional indicia of reliability, a number of exceptions have been developed over the years to allow admissions of hearsay statements made under circumstances that tend to assure their reliability. Among the most prevalent of these exceptions, this Court notes, is the one applicable to declarations against interest. *Id.* at 299. This exception was founded on the assumption that a person is unlikely to fabricate a statement against his own interest at the time it is made. *Id.* at 299.

Lastly, the Court states that, "The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process.' *Dutton v. Evans*, 400 U.S. 74, 89 (1970); *Bruton v. United States*, 391 U.S. 123, 135-7 (1968)." *Id.* at 295.

What exacerbated the prejudice caused by the limitation

of cross examination was the fact that trial judge had allowed the government to introduce other statements made by Ajami at the time of his arrest that were consistent with his guilt — statements which inculpated the Petitioners. The court allowed such evidence to be introduced under Rule 801(d)(2)(E), the co-conspirator statements exception to the hearsay rule. This evidence certainly bolstered the government's case, and permitted the jury to find the Petitioners guilty by association. When the same issue arose with respect to statements made by Ajami which *exculpated* the Petitioners, the court chose to label the statements as hearsay statements that did not fall into any exception. The Petitioners should have been allowed to introduce Ajami's statement because it was fundamentally fair to do so. The Petitioners' right to confront witnesses and present witnesses in their defense, as well as present exculpatory evidence, clearly outweighed the government's interest in excluding hearsay evidence. Thus, the decision of the court below directly contravened this Court's decision in *Chambers v. Mississippi*, and ignored the protections set forth in *Chambers* in order to insure that a defendant receives a fair trial.

CONCLUSIONS

For the reasons stated, the Petitioners pray this Court issue a writ of certiorari.

Respectfully submitted,

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Appendix

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JUAN DELGADO, DAGOBERTO SILVA,
HENRY ESCOBAR,
Defendants-Appellants

June 25, 1990

Defendants were convicted in the United States District Court for the Southern District of Florida, No. 81-171-CR-WMH, Wm. M. Hoeveler, J., of conspiracy to distribute cocaine and possession of cocaine with intent to distribute. Defendants appealed. The Court of Appeals, Tjoflat, Chief Judge, held that: (1) prosecutor's remarks during closing argument did not prejudice defendants; (2) plea agreement entered into by codefendant, who pleaded guilty to unrelated charges in exchange for dropping of drug trafficking charges, was not admissible; and (3) evidence was sufficient to sustain conspiracy and possession convictions.

Affirmed in part, and vacated and remanded in part.

1. Criminal Law 1171.3

Prosecutor's statement in rebuttal closing argument that defendants wanted jury to focus its attention on codefendant who had pled guilty, when in reality codefendant had pled guilty to unrelated offense in exchange for Government's dismissal of charges in indictment that gave rise to this case, did not prejudice defendants and did not entitle defendants to mistrial; if defendants were attempting to convince jury to blame codefendant for crime that occurred, prosecutor's misstatement that codefendant pled guilty to those crimes could not have been prejudicial to defendants.

2. Criminal Law 410

Plea agreement and colloquy between Government and codefendant, who pleaded guilty to unrelated offenses in exchange for dismissal of charges that gave rise to drug trafficking case, was not admissible under hearsay exception for admissions by party opponent, although defendants contended that Government's decision to dismiss charges was admission that codefendant was not guilty of alleged conspiracy and would constitute evidence that defendants did not conspire with codefendant; Government's decision not to prosecute codefendant was not an admission of innocence or, at best, merely reflected Government's opinion that codefendant was not guilty. Fed.Rules Evid.Rule 801(d)(2)(D), 28 U.S.C.A.

3. Criminal Law 422(1, 2)

Even if plea agreement and colloquy between Government and codefendant, who pleaded guilty to unrelated offenses in exchange for dismissal of charges that gave rise to drug trafficking case, was relevant, the evidence would not be admissible since it could have opened door to evidence on collateral issues that would likely have confused jury. Fed.Rules Evid.Rule 403, 28 U.S.C.A.

4. Criminal Law 422(5)

Codefendant's statement to law enforcement officer that codefendant was importer of furniture and that four persons just showed up at his warehouse and he did not know why was not admissible in drug trafficking prosecution as a statement against codefendant's penal interest; statement was likely made as an attempt to exculpate codefendant from conspiracy. Fed.Rules Evid.Rule 804(b)(3), 28 U.S.C.A.; U.S.C.A. Const.Amends. 5, 14.

5. Constitutional Law 268(10)
Criminal Law 422(1)

Defendants were not denied due process by not being allowed to introduce evidence of statement made by codefendant who pleaded guilty to unrelated charges in exchange for dismissal of drug trafficking charges; codefendant's

statement to law enforcement officer at time of arrest was not trustworthy and was self-serving statement designed to exculpate himself from drug trafficking conspiracy. U.S.C.A. Const.Amends, 5, 14.

6. Conspiracy 47(12)
Drugs and Narcotics 123(2)

Evidence was sufficient to sustain convictions for conspiracy to distribute cocaine and possession of cocaine with intent to distribute; there was evidence that types of tools that would have been needed to remove false wall in container which contained cocaine were found on floor of warehouse and record suggested tools had been in use during hour in which defendants were in warehouse, and there was evidence that defendants had substantial prior relationships. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), as amended, 21 U.S.C.A. § 841(a)(1); 18 U.S.C.A. § 2.

7. Conspiracy 47(2)

Although mere association between persons is not sufficient to support conviction on conspiracy charge, conspiracy may legitimately be inferred from circumstantial evidence.

8. Drugs and Narcotics 185(4)

Articulable facts warranted Drug Enforcement Administration (DEA) agents' belief that at least one, and possibly two, suspects were hiding in warehouse and, accordingly, cursory inspection of warehouse, which revealed one defendant's shirt in plain view, was valid and shirt and contents in pocket were admissible in drug trafficking prosecution; when agents converged on scene to arrest suspects, one agent noticed someone running into warehouse.

9. Searches and Seizures 162

A person possesses standing to challenge search when he has reasonable expectation of privacy from governmental intrusion in either premises searched or items seized.

10. Searches and Seizures 164

Defendant had standing to challenge seizure of his shirt and papers contained therein, though he did not have expec-

tation of privacy in building in which shirt was found.

11. Searches and Seizures 71

Cursory sweep of area which reasonably prudent officer believes to be harboring suspect may last no longer than is reasonably necessary to dispel suspicion of danger.

12. Drugs and Narcotics 183(6)

Drug Enforcement Administration (DEA) agents' search of cardboard boxes in van after arrest of suspects fell within automobile exception to search warrant requirement; agents maintained constant surveillance of warehouse until they witnessed suspects loading several cardboard boxes from warehouse into van and cardboard boxes were not labeled, which, according to one agent, was a common method of transporting narcotics.

13. Drugs and Narcotics 108

Drug defendant's Colombian credit card was relevant and admissible in drug trafficking prosecution; existence of financial resources in primary drug source country indicated ability of defendant to pay for cocaine shipments at source of supply and had tendency to make defendant's involvement in some sort of drug transaction more probable. Fed.Rules Evid.Rule 401, 28 U.S.C.A.

14. Criminal Law 982.4(1)

Anti-Drug Abuse Act of 1986 did not permit imposition of terms of supervised release for offenses occurring prior to November 1, 1987. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(b)(1)(A), as amended, 21 U.S.C.A. § 841(b)(1)(A).

15. Conspiracy 45

Two airline tickets that were in defendant's possession at time of his arrest and which were issued in names of defendant and codefendant were admissible in prosecution for drug trafficking conspiracy as evidence of prior association. Fed.Rules Evid.Rule 401, 28 U.S.C.A.

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Roy E. Black, Black and Furci, P.A., Miami, Fla., for defendants-appellants.

Frank H. Tamen, Linda Collins-Hertz, Mayra R. Lichter, Asst. U.S. Attys., Miami, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before TJOFLAT, Chief Judge, FAY and COX, Circuit Judges.

TJOFLAT, Chief Judge:

Appellants, Dagoberto Silva, Juan Delgado, and Henry Escobar, appeal their convictions on drug-trafficking charges. Escobar also challenges the supervised release portion of his sentence. We affirm the convictions of all three appellants but vacate their sentences in part and remand for resentencing.

I.

On March 16, 1987, a United States Customs Inspector in Miami, Florida, examined a shipping container that purportedly contained lawn furniture. The inspector found lawn furniture inside the container but also discovered what appeared to be a false wall. The inspector drilled through the back wall of the container and discovered cocaine in a hidden cavity of the container. The United States Customs Service was notified, and a Drug Enforcement Administration Agent, Mark Averi, was assigned to follow the container to its ultimate destination. Working undercover, Agent Averi drove with the shipping company to deliver the container.

The container was delivered to the Ajami Import-Export office where the driver of the truck was greeted by Abdul Ajami and appellant Escobar. Ajami told the driver of the truck to take the container to a warehouse at another location — Ajami and Ricardo Duran would lead the way in their own car. Upon arrival, the truck was backed into the warehouse, and the container was unloaded. At that time, Agent Averi

was able to walk inside the warehouse for about five to ten minutes. Agent Averi than left the warehouse, returned to his own vehicle, and immediately went back to the warehouse to establish surveillance.

Surveillance continued through 1:00 p.m. the next afternoon, when a car carrying two people and a van carrying three people arrived at the warehouse. The five people entered the warehouse and remained there for about one hour. Finally, four people emerged from the warehouse carrying small cardboard boxes. Each person carried one box at a time, and each made about ten or twelve trips. The boxes were loaded into the van.

When it was apparant that the last box had been loaded, DEA Agent Peter Culver ordered approximately seven agents to arrest the five individuals and to seize the boxes. This action was taken before obtaining either a search or arrest warrant. Ajami, Duran, and appellants Silva and Delgado were arrested outside the warehouse, while appellant Escobar ws arrested inside the warehouse.

Inside the warehouse, Agent Culver found several tools, including two crow bars, a come-along, an electric saw with blades, and an extension cord. From the van, agents seized twenty-two cardboard boxes, as well as one box from the trunk of the car. Each box contained a large quantity cocaine: all told, the agents seized 634 kilograms of cocaine with an approximate street value of between $7.6 million and $10.8 million.

On March 26, 1987, a federal grand jury returned an indictment, charging Ajami, Duran, and appellants with (1) one count of conspiracy to distribute cocaine in violation of 21 U.S.C. § 841(a)(1) (1988); (2) one count of possession of cocaine with intent to distribute it in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2; and (3) one count of importing cocaine in violation of 21 U.S.C. 88 952(a), 960(a)(1), and 18 U.S.C. § 2.

Appellants were tried together before a jury.[1] During the

trial, the Government dismissed the importation charge against Silva and Delgado. Silva and Delgado were convicted on the remaining two counts and both were sentenced to eleven years imprisonment on the conspiracy count and eleven years imprisonment with five years supervised release on the possession count. Escobar was convicted on the conspiracy and possession counts but was acquitted on the importation count. He received sentences of twenty years imprisonment for each count with five years of supervised release to follow imprisonment for the possession count. The sentences for all of the appellants were to run concurrently.

All three appellants challenge their convictions on essentially the same five grounds. Specifically, they argue that (1) the prosecutor made highly prejudicial remarks during closing argument, and the district court should have granted a mistrial; (2) the court abused its discretion in refusing to admit into evidence Ajami's plea agreement; (3) the court abused its discretion in refusing to allow cross-examination of Agent Culver with regard to a post-arrest statement by Ajami or to allow a record of that statement into evidence; (4) conspiracy and possession convictions were based on insufficent evidence; and (5) all of the evidence seized from the warehoue and the van was seized in violation of appellants' fourth amendment rights. Additionally, Escobar argues that the district court abused its discretion in admitting into evidence his Colombian MasterCard. Furthermore, he argues that the court erred in imposing a five-year term of supervised release for the possession conviction. Finally, Delgado and Silva argue that the district court abused its discretion in admitting into evidence two airline tickets in the names of Escobar and Silva. We address each of these arguments in turn.

II.

[1] During closing argument, attorneys for the appellants

[1] Ajami entered into a plea agreement with the Government, and Duran's motion for severance was granted. Therefore, Ajami and Duran were not involved in the appellants' trial.

argued at length that the focus of the Government's case had improperly shifted from Ajami to the appellants. According to the appellants, Ajami masterminded the operation and, therefore, the jury should focus its attention on him. The prosecutor stated in rebuttal that the defendants wanted the jury to

> [i]gnore the reasonable and sensible conclusions that when you have got just single packages like this that are worth more money than a lot of honest working people make in a year's time on an honest job — ignore that; [rather, the defendants wanted the jury to] focus [its] attention...on people who have either pled guilty in this case or are not shown to have had an active role at all.

Counsel for the appellants objected to this statement. They noted, correctly, that Ajami had pled guilty to an unrelated offense in exchange for the Government's dismissal of the charges in the indictment that gave rise to this case. The court instructed the jury to disregard both the prosecutor's and the defense attorney's comments.

The prosecutor's statement was indeed incorrect and, in certain circumstances, such a statement might be prejudicial. If it were prejudicial, we would reverse a district court's decision not to grant a mistrial only if the court failed to give a curative instruction or, if it did give an instruction, the statement was "so highly prejudicial as to be incurable." *United States v. Slocum,* 708 F.2d 587, 598 (11th Cir. 1983). In this case, however, we need not examine the effectiveness of the court's curative instruction since we can find no possibility of prejudice from the prosecutor's remarks.

III.

[2] Appellants argue that the district court abused its discretion in refusing to admit into evidence the plea agreement and colloquy between Ajami and the Government. In that agreement, Ajami pled guilty to importing certain artifacts from Ecuador by means of a false or fraudulent invoice, and the Government agreed to dismiss the charges

contained in the March 26, 1987 indictment. Appellants would have us believe that the agreement and colloquy before the court constitute hearsay evidence that should have been admitted under Fed.R.Evid. 801(d)(2)(D) as admissions by a party opponent. According to the appellants, the Government's decision to dismiss the charges in the indictment involved in this case was an admission that Ajami was not guilty of the alleged conspiracy. Such an admission, in turn, would constitute evidence that the appellants did not conspire with Ajami.

We cannot agree with the appellants. There are many factors that influence the government's decision not to prosecute a defendant on certain charges, one of the most common being the government's interest in obtaining the cooperation of the defendant as a witness against codefendants. Certainly, we cannot attribute the government's decision not to prosecute to an independent determination that the defendant is not guilty. Furthermore, by holding that the government admits innocence when it dismisses charges under a plea agreement, we would effectively put an end to the use of plea agreements to obtain the assistance of defendants as witnesses against alleged co-conspirators.

[3] Even if we did agree with the appellants that the government's decision to drop certain charges might constitute an admission of innocence, adopting their argument would create other serious problems at trial, and evidence of the government's decision likely would not be admissible. The government's decision not to prosecute a defendant on certain charges reflects, *at best*, the government's *opinion* that the defendant is not guilty. Thus, the opinion has no more evidentiary value than the opinion of the defendant's attorney, expressed during argument to the jury, that the defendant is not guilty. Even if such evidence is relevant, it would not be admissible under Rule 403. If the evidence were admitted, the government's counsel likely would take the stand and testify that the charges were dropped for reasons unrelated to the guilt of the defendant. The reasons expressed by the government's counsel could be highly

incriminating with regard to the defendant who is seeking to have the evidence admitted. Thus, the district court should probably hold the technically admissible opinion evidence inadmissible because it would open the door to evidence on collateral issues that would likely confuse the jury.

Finally, we have examined the colloquy that occurred when the court accepted Ajami's plea. We have found nothing that conceivably could constitute an admission by the Government that Ajami was not guilty of the conspiracy count. We therefore affirm the district court's refusal to admit the plea agreement and colloquy into evidence.

IV.

[4] Appellants next argue that the court abused its discretion in refusing to allow them to cross-examine Agent Culver with regard to a statement made by Ajami to Culver immediately after Ajami was arrested or to introduce Agent Culver's written report of that statement. The report reads as follows:

> Ajami, when questioned by Special Agent Culver, stated that he was in the warehouse unloading merchandise. Ajami stated that he was an importer of furniture. Ajami said that four persons just showed up at the warehouse and Ajami did not know why. Ajami stated that he thought he might know who the other four persons were, that he had seen them before. Ajami further stated that he did not know where the van came from or who was driving. When questioned by Special Agent Culver about the container, Ajami stated that he did not want to answer any more questions.

Appellants maintain that this report should have been admitted and they should have been allowed to cross-examine Agent Culver with regard to this statement because (1) it was a statement against Ajami's penal interest and therefore an exception to the hearsay rule under Fed.R.Evid.804(b)(3), or (2) it so exculpated the appellants that excluding evidence of this statement denied the appellants due process of the law.

Rule 804(b)(3) provides that "[a] statement which...so far

tended to subject the declarant to civil or criminal liability...that a reasonable person in the declarant's position would not have made the statement unless believing it to be true" is excluded from the hearsay rule. We are unable to discern how Ajami's statement could fall under this exception. Considering the statement made and the circumstances of the arrest, we think that the statement was made to conceal the existence of a conspiracy. The statement therefore was in no way contrary to Ajami's penal interest; rather, it was likely made as an attempt to exculpate Ajami from the conspiracy. And even if the statement was not made to conceal the conspiracy, no possible interpretation of the statement could possibly subject Ajami to criminal liability.

We conclude that the district court did not abuse its discretion in refusing to admit, under Rule 804(b)(3), evidence of the statement.

[5] Appellants' argument that they were denied due process of law by not being allowed to introduce evidence of the statement is equally unavailing. Appellants cite *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), in support of their argument. In *Chambers*, the Court held that, in certain situations, a defendant's right to confront witnesses and to present witnesses in his own defense outweighs a state's interest in excluding hearsay evidence. The appellants are correct in noting that one important consideration is the degree to which the statement in question exculpates the defendant. The Court in *Chambers*, however, recognized another important consideration: the reliability of the statement. *See id.* at 300-01, 93 S.Ct. at 1048-49.

The circumstances surrounding the arrest indicate that Ajami's statement was not trustworthy; rather, it was a self-serving statement designed to exculpate Ajami from the conspiracy. Moreover, Agent Averi's testimony that Escobar and Duran had been with Ajami the night before seriously undermines the reliability of Ajami's statement that the other four persons "just showed up" and he "did not know why." There are no corroborating circumstances apparent

in the record. We hold, therefore, that the appellants' right to confront Agent Culver did not outweigh the interest in excluding hearsay evidence. Evidence of the statement was properly excluded.

V.

[6] Appellants argue that the verdicts of guilty were not supported by the evidence and therefore should be reversed. When reviewing the sufficiency of evidence to support a conviction, we view all of the evidence in a light most favorable to the government, draw all reasonable inferences in favor of the government, and determine whether " 'a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt.' " *United States v. Carcaise,* 763 F.2d 1328, 1330-31 (11th Vit.2986) (quoting *United States v. Bell,* 678 F.2d 547, 549 (5th Cir. Unit B 1982) (en banc), *aff'd,* 462 U.S. 356, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983).

[7] Given our standard of review, the evidence clearly warrants affirmance of the guilty verdicts. Although mere association between persons is not sufficient to support a conviction on a conspiracy charge, a conspiracy may legitimately be inferred from circumstantial evidence. *See United States v. Bascaro,* 742 F.2d 1335, 1359 (11th Cir.1984), *cert. denied,* 472 U.S. 1017, 105 S.Ct. 3476, 87 L.Ed.2d 613 (1985). Here, conspiracy and possession easily may be inferred from the evidence.

Agent Averi testified, that when he walked around the warehouse the night before the arrest, he did not see any cardboard boxes resembling those found in the van the next day. Furthermore, he testified that Ajami and Duran left the warehouse that night at the same time he and the truck driver left. Thereafter, a constant surveillance was maintained. Ajami and Duran arrived the next morning at approximately 9:30 and left about one hour later. They returned about two hours later, followed shortly by the van carrying the appellants. When the appellants arrived, Ajami and Duran were in the process of carrying tools from their car into the warehouse. About one hour later, the men began

loading the cardboard boxes into the van.

The tools that Ajami and Duran carried into the warehouse when the appellants arrived were the types of tools that would have been needed to remove the false wall in the container. These tools were found on the floor of the warehouse in a state that suggests that they had been in use during the hour in which all five suspects were in the warehouse.

Finally, the Government produced evidence that Delgado, Duran, Escobar, and Silva had substantial prior relationships. For example, Duran's bank statements were sent to Escobar's address, and Delgado, at the time of his arrest, was in possession of telephone numbers belonging to Duran and to Escobar's and Silva's beepers.

We think that, viewing this and other evidence in the light most favorable to the Government, a reasonable trier of fact could have found beyond a reasonable doubt (1) that Escobar, Delgado, and Silva had conspired among themselves and with Duran and Ajami to possess and distribute cocaine and (2) that they were knowingly in possession of the cocaine.

VI.

Escobar and Silva both challenge the admission of evidence seized during the warrantless search of the van, and Escobar challenges the admission of evidence seized during the warrantless search of the warehouse. We address the search of the warehouse first.

Escobar challenges the admission of certain personal items introduced into evidence. Specifically, he argues that his shirt and papers found in his shirt pocket, which were seized from the warehouse, and his briefcase, which was seized from the van, should not have been admitted into evidence. For the reasons we discuss below, the search of the van and all containers therein was lawful, *see infra* at 1502-1503; therefore, we hold that the district court properly admitted the briefcase into evidence. The admission of certain items seized from the warehouse, however, presents more difficult questions.

[8] Escobar's shirt and personal papers were seized under the following circumstances. When the DEA agents converged on the scene to arrest the five suspects, one of the agents noticed somebody running back into the warehouse. Three agents followed the person into the warehouse to perform a protective sweep, and Agent Culver, who had apprehended Ajami, entered the warehouse shortly thereafter. It is not clear from the record whether one or two suspects were apprehended in the warehoue, but it is clear that Escobar was found in the warehouse, shirtless, crouching behind a couch. At that time, prior to obtaining a search warrant, the agents seized a telephone beeper next to the couch and Escobar's shirt, which was on a nearby forklift. The agents found several personal papers in Escobar's shirt pocket. The agents were in the warehouse for three to five minutes before leaving. The warehouse was secured, and no agents entered the warehouse until the search warrant was obtained.

[9, 10] The Government contends that Escobar has no standing to challenge the seizure of evidence from the warehouse. We disagree. A person possesses standing when he has a reasonable expectation of privacy from governmental intrusion in either the premises searched or the items seized. *See Mancusi v. DeForte,* 392 U.S. 364, 368, 88 S.Ct. 2120, 2124, 20 L.Ed.2d 1154 (1968). Furthermore, the Supreme Court has held that, in certain circumstances, an employee has standing to challenge searches conducted in his place of employment. *See id.* at 369, 88 S.Ct. at 2124.

In this case, Escobar did not have any general expectation of privacy in the warehouse. Escobar did not have any private space in the warehouse from which he could exclude others. Nor did he have a possessory interest in the building. *See Martinez v. Nygaard,* 831 F.2d 822, 825-26 (9th Cir.1987). This conclusion, however, does not end our inquiry. As one commentator has stated, "[i]t may be significant...that [the item seized] is a personal possession of the defendant and not something connected with the operation of the business." 3 W. LaFave, Search and Seizure § 11.3, at 566 (1978).

Indeed, it appears that, where the defendant's possession was the object of the search, the defendant has standing to challenge the search even though he does not have an expectation of privacy in the premises searched. *See United States v. Alewelt,* 532 F.2d 1165, 1167 (7th Cir.), *cert. denied,* 429 U.S. 840, 97 S.Ct. 114, 50 L.Ed.2d 109 (1976); *see also Martinez,* 831 F.2d at 826 (court finds no standing based on fact that person had "no possessory interest in the place searched *or things seized.*" (emphasis added). We hold, therefore, that Escobar has standing to challenge the seizure of his shirt and the papers contained therein.

[11] Although Escobar has standing to challenge this aspect of the search and seizure, he has no basis for the challenge. the Supreme Court recently held that when "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene," officers may search the area in question without a warrant. *Maryland v. Buie,* — U.S. —, —, 110 S.Ct. 1093, 1098, 108 L.Ed.2d 276 (1990). Any evidence found during "a cursory inspection of those spaces where a person may be found" would then be admissible. *Id.* at —, 110 S.Ct. at 1099. The sweep, however, may last no longer than is reasonably necessary to dispel the suspicion of danger. *Id.* at —, 110 S.Ct. at 1099.

The sweep of the warehouse and seizure of Escobar's shirt clearly were valid under *Buie.* When the agents converged on the scene, they had very good reason to believe that at least one, and possibly two, more suspects were hiding in the warehouse. They performed a protective sweep of the warehouse, finding and arresting Escobar in the process. While performing the sweep, the agents seized Escobar's shirt, which was in plain view near where Escobar had been hiding. The sweep lasted no more than three to five minutes. Thus, the agents had reason to believe that the warehouse harbored an individual who could pose a danger to the agents outside the warehouse; the shirt was found in plain view during a

cursory inspection; and the sweep was short, apparently lasting no longer than necessary. The district court properly admitted the shirt and papers[2] into evidence.

[12] Silva and Escobar[3] maintain that the cocaine seized from the van was seized in violation of the fourth amendment and therefore should not have been admitted into evidence at trial. There is no dispute over the facts: DEA agents, after arresting the suspects, thoroughly searched the van and opened at least two of the cardboard boxes. This search was conducted without a warrant. Silva and Escobar argue that the search of the cardboard boxes violated the fourth amendment. The Government responds by arguing that the search of the cardboard boxes falls within the automobile exception announced in *Carroll v. United States,* 267 U.S.132, 45, S.Ct. 280, 69 L.Ed. 543 (1925), and as applied in *United States v. Ross,* 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). We agree with the Government.

In *Ross,* police officers were informed by a reliable source that the defendant was selling narcotics that were kept in the trunk of his car. Police officers drove to the site where the car was located and shortly thereafter arrested the defendant. Acting without a warrant, one of the officers opened the trunk of the car and found a brown paper bag inside. The officer then opened the bag and discovered within it smaller bags containing heroin. The heroin was admitted into evidence at the defendant's trial. The Supreme Court

[2]Escobar does not describe, and the record does not reveal, the precise manner in which the papers were seized from the shirt. Moreover, Escobar does not specifically challenge the agents' conduct in searching the shirt pocket *once they had seized the shirt,* arguing only that the search of the *warehouse* was improper. Having concluded that the agents' search of the warehouse and seizure of the shirt was proper, we have no occasion to address the validity of the agents' search of the shirt pocket.

[3]Silva owned the van and therefore has standing to challenge the search. Escobar, on the other hand, may not have had a sufficient expectation of privacy in the van to give him standing to challenge the search. We need not decide this question, however, because as we explain in the text, the search was valid under the fourth amendment.

found no fourth amendment violation in the officer's search of the brown paper bag. It held that "[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *Id.* at 825, 102S.Ct. at 2173.

In *United States v. Amorin*, 810 F.2d 1040 (11th Cir.1987), police had probable cause to believe that a green duffle bag in the defendant's possession contained cocaine. While the defendant's house was under surveillance, the police saw the defendant place the duffle bag in his vehicle. As the defendant was about to enter the vehicle, he was arrested, and the duffle bag was searched without a warrant. We upheld the district court's admission of the cocaine into evidence, holding that the "search of the vehicle clearly falls within the automobile exception to a warrant requirement." *Id.* at 1041 (citing *Ross*).

The search of the cardboard boxes in this case was plainly valid under *Ross* and *Amorin*. DEA agents knew that a shipment of cocaine had been taken to the warehouse. The agents maintained constant surveillance over the warehouse until they witnessed the suspects loading several cardboard boxes from the warehouse into the van. The cardboard boxes were not labelled, which, according to Agent Culver, is a common method of transporting narcotics. The agents unquestionably had probable cause to believe that the boxes contained cocaine and had suffucient grounds for arresting the suspects. Furthermore, since the agents had probable cause to believe that the van contained cocaine, they had probable cause to search the van and all of the contents of the van that might conceal the cocaine. The district court's decision to admit into evidence the cocaine seized from the van was therefore proper under *Ross* and *Amorin*.

VII.

[13] Escobar argues that the court abused its discretion in admitting into evidence his Colombian Master Card found in his wallet at the time of his arrest. According to Escobar, the Master Card is not relevant to any issue in this case, and,

even if it is relevant, the prejudice caused by introducing this evidence far outweighs its probative value.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed.R.Evid. 401. There is testimony in the record that Colombia is the primary source of cocaine imported into the United States and that Ecuador (the country from which the cocaine in this case arrived) serves primarily as a "transit country" for the exportation of cocaine to the United States. The existence of financial resources in the primary source country indicates an ability to pay for cocaine shipments at the source of supply and has a tendency to make Escobar's involvement in some sort of drug transaction more probable. We think that the Master Card is relevant under Rule 401.

All relevant evidence is admissible, Fed.R.Evid. 402, unless "its probative value is *substantially* outweighed by the danger of unfair prejudice," Fed.R.Evid. 403 (emphasis added). This determination is left to the discretion of the district court, and we review only for abuse of that discretion. *See Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc.*, 630 F.2d 250, 267 (5th Cir.1980).[4] In this case, the district court determined that the danger of prejudice did not substantially outweigh the probative value of the credit card, and we see no reason to question that holding. Although the credit card is no more than circumstantial evidence, it does not have " 'an undue tendency to suggest [a] decision on an improper basis, [particularly] an emotional one.' " *See Cauchon v. United States*, 824 F.2d 908, 914 (11th Cir.) (quoting *United States v. Grassi*, 602 F.2d 1192, 1197 (5th Cir.1979), *vacated*, 448 U.S. 902, 100 S.Ct. 3041, 65 L.Ed.2d 1131 (1980) (no danger of unfair prejudice in admitting evidence that person charged with possession of controlled substance advertised in magazine

[4]In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

that advocated use of recreational drugs), *cert. denied,* 484 U.S. 957, 108 S.Ct. 355, 98 L.Ed.2d 380 (1987). We hold that the district court did not abuse its discretion in admitting the credit card into evidence.

VIII.

[14] Escobar argues that, because the offense occurred prior to November 1, 1987, the district court did not have the authority to impose the five-year period of supervised release to follow the term of imprisonment for the possession conviction, *See United States v. Levario,* 877 F.2d 1483, 1487-89 (11th Cir.1989) (provisions of Anti-Drug Abuse Act of 1986 that permit imposition of terms of supervised release not applicable to offenses occurring prior to November 1, 1987). The Government concedes this point. We therefore vacate the five-year term of supervised release and remand to the district court for resentencing, particularly to determine whether a special parole term should be imposed, *see United States v. Smith,* 840 F.2d 886, 890 (11th Cir.) *cert. denied,* — U.S. —, 109 S.Ct. 154, 102 L.Ed.2d 125 (1988).

Silva and Delgado also received five-year terms of supervised release to follow their terms of imprisonment for the possession convictions. Neither of the appellants, however, challenged this portion of their sentences. Nevertheless, we think that the district court's error in imposing the periods of supervised release constitutes plain error. Therefore, we vacate Silva's and Delgado's terms of supervised release and remand to the district court for resentencing in light of our disposition.

IX.

[15] Silva and Delgado contend that the district court abused its discretion in admitting into evidence two airline tickets that were in Escobar's possession at the time of his arrest. The tickets were issued in the names of "Henry Escobar" and "D. Sylva." Silva and Delgado argue that this evidence was not relevant, and that, even if it was relevant, the danger of unfair prejudice substantially outweighed the probative value of the tickets. We disagree. Under Rule 401,

evidence of prior association is relevant to the issue of conspiracy, and we can perceive of no danger of inflaming the emotions of the jury or otherwise improperly influencing the jury from admitting the tickets into evidence. The district court did not abuse its discretion in admitting these tickets into evidence.

X.

To summarize, we affirm the district court's judgment in all respects except with regard to the appellants' five-year terms of supervised release. We vacate that portion of the appellants' sentences and remand for further proceedings consistent with this opinion.

AFFIRMED in part, and VACATED and REMANDED in part.